



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT NO 155 OF 2013 (OS)

MASHA BIRYA DENA.....PLANTIFF/APPLICANT

VERSUS

FRED KARL SCHUMACHER

HANS KOSCHAMNY.....DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is the one dated 22nd August 2016 brought under the provisions of Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 40, 45, 46 and 51 of the Civil Procedure Rule, seeking the following orders:

1) Spent

2) That this Honourable Court do restrain the defendants/respondents and/or their agents, employees, servants, 3rd parties from interfering with the suit property, evicting the applicant selling, transferring, constructing, and/or in any other matter whatsoever pending hearing and determination of the application and the suit hereafter.

3) That the Honourable court be pleased to review judgment delivered on 20th May 2016 by Honourable A. Omollo to the extent that the orders issued be and are hereby set aside quashed/vacated and/or in the alternation the matter be and is hereby re-opened again for hearing and/or for entry of interlocutory judgment in favour to he plaintiff/applicant herein.

4) That the Honourable court do hereby direct the Land Registrar, Mombasa Lands Registry to reconstruct the Land Records of Plot No.1318(original No.743/2) Section III Mainland North without gazettelement of its indemnity in the event the records cannot be traced.

5) That the Honourable Court do hereby direct the Land Registrar, Mombasa Lands Registry to register Plot No.1318/(Original 743/2) Section III Mainland North and issue a provisional Title Deed in favour of the Plaintiff/applicant without gazettelement and/or in the alternative the Deputy Registrar High Court of Kenya Lands Division do execute transfer in favour of the plaintiff.

6) That the court may grant any other orders(s) it may deem fit in the circumstances.

7) That the costs of the application be in the cause.

2. The application is premised on the grounds on the face of it inter alia that the plaintiff has for over twenty five (25) years lived on the suit property and taken care of the property. The defendants were fully aware of the plaintiffs stay on the suit property and the plaintiff has enjoyed quite and peaceful occupation and use of the land. Further that after judgment, the defendants have jointly and severally instructed their agents, servants and/or employees to evict the plaintiff without any notice or court order and they are now in the process of constructing a gate. The application is supported by the affidavit of the plaintiff which annexed a copy of the judgment.

3. The application is unopposed the case having proceeded on for oral proof. The prayer no.3 being granted. I say so because the suit having been dismissed, no orders of injunction and or reconstruction of a the land records can issue unless the order of dismissal is varied and/or set aside. Therefore my duty is to determine whether the application meets the threshold for reviewing of a decree or order as set out in order 45 which are

i. Discovery of new and important matter or evidence which after the exercise of due diligence was not with his knowledge.

ii. Mistake or error apparent on the face of the record.

iii. For any other sufficient reason.

4. The applicant has not mentioned that he has discovered any new evidence that was not within his reach when the decree or order was passed. Neither has he said there was mistake or error apparent on the face of the record. In fact the pleadings does not urge even the 3rd head of sufficient reason. However I will consider the application on the basis of the grounds listed and the evidence adduced to determine whether there is any sufficient cause to vary the order of dismissal.

5. It is not in dispute that the plaintiff gave evidence that he lives on the suit property and that he was put on the suit property by the registered owners to take care of it. That to date the defendant has not communicated to him. The plaintiff also stated that he has only cultivated and developed the suit property for over twenty five years. For the reasons that the employment contract between the plaintiff and the defendants may have been terminated due to lack of communication between them, I shall take the presumption that the plaintiff's confirmed occupation of the suit property became adverse to that of the defendants. Therefore it is my opinion and I so hold that although the initial entry of the plaintiff was by consent of the defendants, the plaintiff's continued stay has since dispossessed the defendant of use of this land.

6. Consequently I make the conclusion that there is sufficient cause to vary the order dismissing the plaintiff's suit and substitute it with an order allowing the plaintiff's suit in terms of prayers number 3-6 of the originating Summons dated 25th July 2013. There was no evidence of any interference of plaintiff's occupation of the land. There was no photographs shown of any construction of a gate as alleged. Secondly the prayers of reconstruction of the land records was not contained in the originating summons. It is a substantive prayer which cannot be granted without adducing of evidence. Similarly there is under section 36 of the Land Registration Act to be followed for issuance of duplicate certificate of title. The plaintiff did not lay a basis why this process should be skipped for me to grant prayer 5 of his application the court will not impose orders on the Land Registrar where no special circumstances require the same to be done.

7. Accordingly the application succeeds the extent that prayer 3 of the motion granted. I dismiss prayers nos.2, 4, 5 for lack of merit. I find no other order to grant as requested in no.6. The applicant shall bear the costs of his application.

Ruling delivered, dated and signed at Mombasa this 3rd day of October 2017

A. OMOLLO

JUDGE